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AFFYMETRIX, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AFFYMETRIX, INC., a Delaware corporation,

Civil Case No. C03 3779 WHA

Plaintiff and
Counterdefendant

STIPULATED PROTECTIVE ORDER

v.

MULTILYTE LTD., a British corporation,

Defendant and
Counterclaimant.

1 Plaintiff Affymetrix, Inc. ("Affymetrix") and defendant Multilyte Ltd. ("Multilyte"), by
 2 and through their respective counsel of record, hereby stipulate and agree as follows:

3 1. All Confidential Information produced or exchanged in the above-entitled action
 4 shall be used solely for the purpose of preparation and trial of this litigation and currently-pending
 5 international litigation between the parties to this action and for no other purpose whatsoever, and
 6 shall not be disclosed to any person except in accordance with the terms hereof or as required by
 7 law or Court order.

8 2. "Confidential Information," as used herein, means any information of any type,
 9 kind or character that is designated as "Confidential" or "Confidential, Attorneys' Eyes Only," by
 10 any of the supplying or receiving parties, whether it be a document, information contained in a
 11 document, information revealed during a deposition, information revealed in an interrogatory
 12 answer or otherwise. In designating information as "Confidential" or "Confidential, Attorneys'
 13 Eyes Only," a party will make such designation only as to that information that it in good faith
 14 believes is entitled to such designation.

15 3. (a) Information that may be designated "Confidential" includes, but is not
 16 limited to, non-public technical, financial, or customer information, or information of a personal
 17 or sensitive nature.

18 (b) Information that may be designated "Confidential, Attorneys' Eyes Only"
 19 includes, but is not limited to, (i) proprietary technical information and specifications, (ii) trade
 20 secrets, (iii) confidential know-how, (iv) proprietary business and financial information and any
 21 non-public information, the disclosure of which is likely to have the effect of causing significant
 22 competitive harm to the disclosing party or party from which the information was obtained.

23 (c) Nothing shall be regarded as "Confidential Information" if it is information
 24 that:

25 (i) is in the public domain at the time of disclosure;
 26 (ii) becomes part of the public domain through no fault of the non-
 27 disclosing party; or

28 (iii) is lawfully received by the receiving party from a third party at a

1 later date without restriction as to disclosure, provided such third party has the right to make the
2 disclosure to the receiving party.

3 4. (a) “Counsel of Record,” as used herein means Heller Ehrman White &
4 McAuliffe LLP; O’Melveny & Myers LLP; Michael J. Malecek, George C. Yu, and Daniel R.
5 Reed of Affymetrix. In order to fall within the category of “Counsel of Record,” Mr. Malecek,
6 Mr. Yu, and Mr. Reed are required at all times to maintain all Confidential Information at
7 Affymetrix’s Emeryville location, which is separate and apart from the business location of any
8 of Affymetrix’s competitive decisionmakers, such as management, business development,
9 licensing, or the rest of the legal department outside of its litigation department, of which Messrs.
10 Malecek, Yu, and Reed are members; to maintain all Confidential Information in specific
11 locations or offices that are locked and that are inaccessible to anyone outside Affymetrix’s
12 litigation department; to maintain all electronic versions of Confidential Information on servers
13 that are inaccessible by persons outside of Affymetrix’s litigation department; to store all
14 Confidential Information in locked locations when it is not currently in use in connection with
15 this litigation; and to take all other precautions necessary to guard against its disclosure to anyone
16 inside or outside of Affymetrix other than themselves and their support staff.

17 (b) “Qualified Persons,” as used herein means:

18 (i) Counsel of Record and international counsel to the parties of this
19 action (Bristows; Bird & Bird; Rospatt Osten Pross; Uexkull & Stolberg; Hoffmann · Eitle) and
20 such counsel’s support staff, legal assistants and clerical personnel who are working on this
21 proceeding and need to have access to such information for the purposes of this litigation and
22 currently pending international litigation between the parties to this action, provided that any
23 person who is currently involved, or whose job responsibilities make them likely to be involved
24 in the future, in the preparation or prosecution of patents or patent applications directed to arrays
25 for analyte detection are excluded from the definition of “Qualified Persons;”

26 (ii) Independent experts or consultants, provided that, not less than
27 seven (7) calendar days prior to any disclosure of Confidential Information to such expert or
28 consultant, counsel for the party desiring to disclose such Confidential Information to such expert

1 or consultant has provided written notice to counsel for all other parties and to any non-party that
2 has designated the information as “Confidential Information” identifying (a) the name, address
3 and title of the proposed recipient; (b) current business affiliation of the recipient (including any
4 affiliation as an expert, an advisor, a consultant or any other similar role); (c) any known present
5 or former relationships between the recipient and any party; and (d) to the extent feasible, all
6 business relationships during the past four years involving arrays for analyte detection. The
7 notice shall be accompanied by a copy of the Affidavit that is appended to this Order as Exhibit
8 A, signed by the proposed expert or consultant. If the party designating the information as
9 “Confidential Information” objects to the disclosure, in writing, within seven (7) calendar days of
10 receipt of the notice, no “Confidential Information” shall be disclosed to the designated expert or
11 consultant unless and until the matter is resolved by agreement of the parties or by an Order of the
12 Court. It shall be the responsibility of the objecting party to file a motion with the Court seeking
13 to preclude disclosure of “Confidential Information” to the designated expert or consultant within
14 seven (7) calendar days of serving its objection. Failure to so move eliminates the objection. The
15 objecting party shall have the burden of demonstrating good cause why a designated expert or
16 consultant should not be allowed to review “Confidential Information.”

(iii) Any other person that may be designated as a Qualified Person by
order of this Court, after notice and opportunity to be heard to all parties.

21 (e) Information designated “Confidential” may be disclosed to Qualified Persons;
22 to officers, directors, employees, and managing agents of a party; and to former officers,
23 directors, employees, and managing agents of a party, provided that such person would
24 reasonably have had access to the Confidential Information during his or her affiliation with the
25 party.

26 5. (a) Documents produced in this action may be designated by any party or
27 parties as "Confidential" or "Confidential, Attorneys' Eyes Only" by marking each page of the
28 document(s) with the designation "Confidential," or "Confidential, Attorneys' Eyes Only."

(b) In lieu of marking the original of a document, if the original is not produced, the designating party may mark the copies that are produced or exchanged. Originals shall be preserved for inspection.

4 || 6. (a) Information disclosed at:

19 7. Copies of documents produced under this Protective Order may be made, or
20 exhibits prepared, by independent copy services, printers, illustrators or similar consultants
21 involved in preparation for trial or other proceedings in this litigation.

22 8. Nothing herein shall prevent disclosure beyond the terms of this Order if each
23 party designating the information as “Confidential” or “Confidential, Attorneys’ Eyes Only”
24 consents to such disclosure or if the Court, after notice to all affected parties, orders such
25 disclosures. Nothing herein shall prevent any Counsel of Record from utilizing “Confidential
26 Information” in the examination or cross-examination in this litigation of any person who is
27 indicated on the document as being an author, source, or recipient of the “Confidential
28 Information,” irrespective of which party produced such information. Nothing herein shall

1 prevent any Counsel of Record from utilizing "Confidential Information" in the examination or
2 cross-examination in this litigation of any person who is a current officer, director, or employee
3 of the party so designating the information as "Confidential" or "Confidential, Attorneys' Eyes
4 Only" or of the party that produced the information.

5 9. If a party inadvertently discloses any document or thing containing information
6 that it deems confidential without designating it as "Confidential" or "Confidential, Attorneys'
7 Eyes Only," the disclosing party shall promptly upon discovery of such inadvertent disclosure
8 inform the receiving party in writing, and the receiving party and all Qualified Persons possessing
9 such information shall thereafter treat the information as "Confidential" or "Confidential,
10 Attorneys' Eyes Only" under this Order. To the extent such information may have been disclosed
11 to persons other than persons described in this document, the receiving party shall make every
12 reasonable effort to retrieve the information promptly from such persons and to avoid any further
13 disclosure to and by such persons.

14 10. A party shall not be obligated to challenge the propriety of a designation as
15 "Confidential" or "Confidential, Attorneys' Eyes Only" at the time made, and a failure to do so
16 shall not preclude a subsequent challenge thereto. In the event that any party to this litigation
17 disagrees at any stage of these proceedings with the designation by the designating party of any
18 information as "Confidential" or "Confidential, Attorneys' Eyes Only," the parties shall first try
19 to resolve such dispute in good faith on an informal basis. If the parties are unsuccessful in
20 informally resolving any disputes regarding the designation of any document or information as
21 "Confidential" or "Confidential, Attorneys' Eyes Only," the Court shall resolve all such disputes.
22 It shall be the burden of the party making any designation to establish that the information so
23 designated is "Confidential" or "Confidential, Attorneys' Eyes Only" within the meaning of this
24 Protective Order.

25 11. In the event "Confidential Information" is used in any court filing or proceeding,
26 including but not limited to its use at trial, it shall not lose its confidential status as between the
27 parties through such use. Portions of pleadings or briefs quoting, discussing, or attaching
28 "Confidential Information" shall be filed under seal in order to keep them out of the public record

1 in this action.

2 12. Unless otherwise agreed to in writing by the parties or ordered by the Court, all
3 proceedings involving or relating to documents or any other information shall be subject to the
4 provisions of this Protective Order.

5 13. In the event any person or party that has possession, custody, or control of any
6 information designated as "Confidential" or "Confidential, Attorneys' Eyes Only" pursuant to the
7 terms of this Protective Order receives a subpoena or other process or order to produce such
8 information, such person or party shall notify by mail the counsel for the party or persons
9 claiming confidential treatment of the documents sought by such subpoenas or other process or
10 order, shall furnish such counsel with a copy of said subpoena or other process or order, and shall
11 cooperate with respect to any procedure sought to be pursued by the party whose interests may be
12 affected. The party asserting the confidential treatment shall have the burden of defending
13 against such subpoena, process or order. The person or party receiving the subpoena or process
14 or order shall be entitled to comply with it except: (a) to the extent the party asserting the
15 confidential treatment is successful in obtaining an order modifying or quashing it; and (b) in
16 complying with the process or order shall, at a minimum, seek to obtain confidential treatment of
17 the "Confidential Information" before producing it in the other proceeding or action.

18 14. This Protective Order shall apply to the parties and any non-party from whom
19 discovery may be sought and who desires protection for the discovery sought. Thus, any non-
20 party requested or required to produce or disclose information in this proceeding, through
21 subpoena or otherwise, may designate such information pursuant to the terms of this Protective
22 Order.

23 15. Nothing herein requires disclosure of information, documents or things which the
24 disclosing entity contends are protected from disclosure by the attorney-client privilege or the
25 work-product doctrine. Nothing herein shall preclude any party from moving this Court for an
26 order directing the disclosure of such information, documents or things. Nothing herein shall
27 prevent a party from requesting the return of inadvertently produced material protected by the
28 attorney-client privilege or the work product doctrine, which request shall be promptly complied

1 || with by the other party.

2 16. Within ninety (90) days after conclusion of this litigation and any and all appeals
3 thereof, any original document and all reproductions of “Confidential” or “Confidential,
4 Attorneys’ Eyes Only” documents produced by a party shall be returned to the producing party
5 or, with the consent of the producing party, destroyed. Counsel of Record for a receiving party
6 may retain one set of pleadings and transcripts (with exhibits) under this Protective Order unless
7 this Court directs otherwise. If counsel retains such materials, the materials shall be accessible
8 only by Qualified Persons defined in paragraph 4(b)(i) above. If destroyed, counsel for the
9 receiving party shall certify to counsel for the producing party compliance with this paragraph
10 within fourteen (14) calendar days of such destruction. As far as the provisions of any protective
11 orders entered in this action restrict the communication and use of the documents produced
12 thereunder, such orders shall continue to be binding after the conclusion of this litigation, except
13 that (a) there shall be no restriction on documents that are used as exhibits in Court unless such
14 exhibits were filed under seal, and (b) a party may seek the written permission of the producing
15 party or order of the Court with respect to dissolution or modification of such protective orders.

IT IS SO STIPULATED.

HELLER EHRLMAN WHITE & McAULIFFE LLP

19 Dated: February 9, 2004 By: s / Christine Saunders Haskett
20
21 M. Patricia Thayer
Michael K. Plimack
Christine Saunders Haskett
Attorneys for Defendant Multilyte Ltd.

O'MELVENY & MYERS LLP

25 Dated: February 9, 2004 By: s / John C. Kappos
26 George A. Riley
27 John C. Kappos
Diane K. Wong
Attorneys for Plaintiff Affymetrix, Inc.

1 IT IS SO ORDERED.
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4 Dated: _____
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The Honorable William H. Alsup
United States District Judge

1 EXHIBIT A
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3 STATE OF _____)
4 COUNTY OF _____)
5 _____, swears or affirms and states under penalty of perjury:
6
7 1. I have read the Protective Order in *Affymetrix Inc. v. Multilyte Ltd.*, No. C03 3779
8 (WHA), a copy of which is attached to this Affidavit.
9
10 2. I promise that I have not and will not divulge, or undertake to divulge to any
11 person or recording device any Confidential Information shown or told to me except as
12 authorized in the Protective Order. I will not use the Confidential Information for any purpose
13 other than this litigation.
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15 3. For the purposes of enforcing the terms of the Protective Order, I hereby submit
16 myself to the jurisdiction of the court in the civil action referenced above.
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18 4. I will abide by the terms of the Protective Order.
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(Signature)

(Print or Type Name)

Address:

Telephone No.: (_____) _____

1 **ECF CERTIFICATION**

2 I, John C. Kappos, am the ECF User whose identification and password are being used to
3 file this STIPULATED PROTECTIVE ORDER In compliance with General Order 45.X.B, I
4 hereby attest that Christine Saunders Haskett has concurred in this filing.

5

6 Dated: February 9, 2004

O'MELVENY & MYERS LLP

7

8 By: s/ John Kappos

9 Attorneys for Plaintiff and Counterdefendant
10 AFFYMETRIX, INC.

11 IR1:1050621.3

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